

No. 10764

United States
Circuit Court of Appeals
For the Ninth Circuit 6

THE APACHE LAND AND CATTLE COMPANY,
a corporation,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY,
a corporation, et al,

Appellees.

Appellant's Opening Brief

Upon Appeal from the District Court of the United States
for the District of Arizona.

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Appellant's Opening Brief

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The Apache Land and Cattle Company, plaintiff below, hereinafter referred to as 'Apache', is a corporation organized under the laws of the State of Colorado; The Franklin Life Insurance Company, defendant below, hereinafter referred to as 'Franklin', is a corporation organized under the laws of the State of Illinois; the value of the property involved is largely in excess of \$3,000 and a separable controversy exists between Apache and Franklin (Apache's complaint, T. R. 2; Franklin's answer T. R. 8). The action between citizens of different states, was removed from the Superior Court of Apache County, Arizona, to the United States District Court for the District of Arizona, which has

jurisdiction under the provisions of Section 27, U. S. Judicial Code, Title 28, U. S. C. A. Section 41, p. 32. Judgment adverse to Apache was rendered by the United States District Court for the District of Arizona (T. R. 46), and this Court has jurisdiction upon this appeal to review the said judgment under the provisions of Section 128, Judicial Code, Title 28, U. S. C. A. Section 225, p. 294.

STATEMENT OF THE CASE

On August 19, 1942, Apache filed in the Superior Court of Apache County, Arizona, its complaint to quiet title to certain lands located in Apache County, Arizona. (T. R. 2-7). Franklin caused said case to be removed to United States District Court because of diversity of citizenship, value of property was more than \$3,000, and a separable controversy.

The complaint alleges that the Apache Land and Cattle Company is the owner in fee simple of certain described lands in Apache County, Arizona, and that the Franklin Life Insurance Company makes some claims adverse to the Apache in the said lands; that said claims of Franklin are without right; that Franklin has no right, title, claim or interest in said property, and prays that Franklin be required to set forth the nature of its claims; that it be adjudged and decreed that Apache is the owner of the said property in fee simple, and that Franklin be barred and estopped from having any claim adverse to Apache (T. R. 2).

The Franklin removed the case to the United States District Court of Arizona and filed its answer (T. R. 8), alleging that it is the owner in fee simple of all of said land by reason of proceedings in a certain foreclosure action wherein Franklin was plaintiff and Apache was defendant, No. 2065, Superior Court of Apache County, Arizona, commenced on or about the 19th day of February, 1938, and whereby Franklin on the 12th day of April, 1941, recovered a sheriff's deed to all of said property.

On July 6, 1943, Apache filed its reply (T. R. 12) in which it alleged that at all of the times and dates referred to in Franklin's answer, Franklin had failed to qualify to do business in Arizona, and that it was at all of said times engaged in an enterprise of permanence and durability in Arizona, did transact a substantial part of its business in Arizona, and that each and all of said acts of Franklin were wholly void. Thereafter, on October 27, 1943, Franklin served and filed its motion for summary judgment (T. R. 14), based upon the pleadings and certified copies of certain written documents in the foreclosure case between Franklin and Apache (T. R. 15-44), and referred to in said motion, alleging that there was no genuine issue of fact. Franklin contends that it is the owner of the land by reason of a sheriff's deed (T. R. 37), dated April 12, 1941, in said foreclosure suit in Apache County. It is not disputed that the said foreclosure suit was so commenced and that the said sheriff's deed was so issued conveying the same land described

in Apache's complaint in the case at bar. In its reply (T. R. 12) Apache alleges that, at all of the times when the notes and mortgages (T. R. 9), upon which the foreclosure case is based, and prior thereto, the Franklin was a foreign corporation organized under the laws of Illinois, and had wholly failed to qualify to do business in Arizona, and therefore all of said indebtedness, notes, mortgage and all of the said foreclosure proceedings and the sheriff's deed are void (53-801, 802 ACA 1939, hereinafter set forth in full). The Franklin contends that, as Apache did not plead said lack of qualification in the foreclosure suit, the question is *res judicata*. Apache contends that such lack of qualification is not *res judicata* but can lawfully be pleaded in the case at bar.

The District Court granted Franklin's motion for summary judgment (T. R. 45) and entered judgment (T. R. 46) that Apache had no right, title or interest in said property.

Apache gave notice of appeal to this Court (T. R. 50), filed its cash appeal bond (T. R. 51), and thus this case comes before this Court on appeal.

(The word 'complaint' appearing in the 5th line on page 13, Transcript of Record, is a typographical error and should be 'answer'.)

SPECIFICATION OF ERRORS

I.

The District Court erred in granting Franklin's motion for summary judgment for the reason that the issue

of Franklin's failure to qualify was not and could not be res adjudicata.

II.

The District Court erred in rendering summary judgment for the reason that the issue of Franklin's failure to qualify was not and could not be res judicata.

III.

The District Court erred in granting the motion for summary judgment and rendering judgment against Apache for the reason that when a general judgment is rendered which specifically expresses the issues determined and upon which relief is granted, only such issues are res judicata; the judgment in the foreclosure case is general and does not expressly find as to Franklin's lack of qualification.

ARGUMENT

There is but one point before this court on this appeal and that is whether the question of the lack of qualification by Franklin is now res judicata in this action because Apache did not plead it in the foreclosure proceedings. In its reply in the case at bar Apache pleaded such lack of qualification and the lower court held that such plea was not open to Apache; that the question was res judicata because it should have been pleaded in the foreclosure action.

Our position is that we have the right to now plead the lack of qualification in the case at bar for the following reasons:

(1) That the judgment in the foreclosure case is general and where a judgment is general, but specifically expresses the issues determined upon which relief is granted, only such issues are *res judicata*; the judgment in the foreclosure case makes no specific findings as to Franklin's lack of qualification;

(2) That it is a matter of public policy of the State;

(3) That neither the plaintiff nor anyone else can waive the same;

(4) That it is one of the matters which can be raised at any time in any action;

(5) That it is the duty of any court in Arizona upon facts coming to its attention, showing such disqualification, to immediately declare any and all acts of such foreign corporation wholly void.

DISCUSSION OF POINT 1

As there is but one point at issue, the argument applies to all of the specification of errors, and we will here discuss the first reason, hereinafter immediately given, to sustain our position.

That the judgment in the foreclosure case is general and where a judgment is general, but specifically expresses the issues determined upon which relief is granted, only such issues are *res judicata*; the judgment in the foreclosure case makes no specific findings as to Franklin's lack of qualification.

The judgment in the foreclosure case is not a bar as it is general, specifically expresses the issues determined,

and makes no findings with reference to Franklin's lack of qualification; therefore, that issue is not *res judicata*.

"The general rule is not applicable when the judgment specifically expresses the issues determined and upon which relief is granted; in such case only the issues so specified are *res judicata*."

34 C. J. 859 (Par. exceptions to rule)

"The recognized principle that, where a general judgment is rendered, all matters that might have been interposed as a defense are considered as adjudicated between the parties, is not applicable when a decree specifically expresses the issues determined and upon which the relief is granted, in which case only such issues are *res judicata*."

*Louisville & N. R. Co. v. Railroad
Commission of Alabama,*
205 Fed. 800 (Syl. 2)

In the foreclosure case the court in its judgment and decree specifically expressed the issues which were determined and upon which relief was granted. The defense that the defendant was not qualified is not mentioned. Therefore, the question is not barred by the said judgment in the foreclosure proceedings. The findings of the lower court are contained in the first paragraph of the judgment on page 19 T. R., and are "(1) that all of the allegations and averments contained in the complaint and in the supplemental complaint are true; (2) that the defendant is indebted to plaintiff in the total agreed sum as aforesaid of \$225,000.00, and that plaintiff is entitled to have judgment entered in said

action for said sum; (3) that plaintiff is entitled to an order and decree directing the sale of the mortgaged lands and premises described in said complaint, and the application of the proceeds, as far as possible, to the satisfaction of the judgment to be entered upon said indebtedness."

DISCUSSION OF POINTS 2, 3, 4 AND 5

We will now discuss points (2), (3), (4) and (5), which are as follows:

- (2) That it is a matter of public policy of the State;
- (3) That neither the plaintiff nor anyone else can waive the same;
- (4) That it is one of the matters which can be raised at any time in any action;
- (5) That it is the duty of any court in Arizona upon facts coming to its attention, showing such disqualification, to immediately declare any and all acts of such foreign corporation wholly void.

The pertinent sections of Arizona Code Annotated 1939, which are rescripts of Sections 657, 658, Revised Code of Arizona, 1928, are as follows:

"53-801. REQUIREMENTS TO DO BUSINESS IN THIS STATE—CORPORATIONS EXCEPTED.—Any foreign corporation, before entering upon, doing, or transacting any business, enterprise, or occupation, in this state shall:

File a certified and authenticated copy of its articles of incorporation or charter with the corporation commission of this state;

Publish its articles of incorporation and file affidavit thereof as required of domestic corporations;

Appoint in writing over the hand of its president or other chief officer, attested by its secretary, a statutory agent in each county in this state in which such corporation proposes to carry on any business as required of domestic corporations;

Pay a license fee of fifteen dollars (\$15.00) to the corporation commission, and obtain from said corporation commission a license to do business in this state.

This section, however, shall not apply to insurance corporations, nor to any foreign corporation, the only business transaction of which, within the state, shall be the loaning of funds to religious, social or benevolent associations, or corporations organized for purposes other than profit."

X ("53-802. ACTS VOID UNLESS STATUTES COMPLIED WITH. — No foreign corporation shall transact any business in this state until it has complied with the requirements of the preceding section, *and every act done by said corporation prior thereto shall be void.* 720 2 m

By the express language of the statute the indebtedness, the notes, the mortgage and all of the proceedings in the foreclosure case, and each and every act that Franklin did in this connection were and are wholly void.

A void contract is one which never had any legal existence or effect and cannot in any manner have life breathed into it.

National Union Indemnity Co. v. Bruce Bros. Inc.
44 Ariz. 455, 463; 38 P. (2) 648

“‘Void’ used in its strict sense, as being absolutely void, means that a proceeding to which it applies is an absolute nullity—without any force or effect. *McGarry v. Village of Wilmette*, 135 N. E. 96, 98; 303 Ill. 147.”

“A ‘void’ thing is no thing; it has no legal effect whatsoever; and no rights whatever can be obtained under it or grow out of it. In law it is the same thing as if the void thing had never existed.” *Mobile County v. Williams*, 61 So. 963, 965; 180 Ala. 639.

Vol. 7 Words & Phrases, Third Series, 875.

The allegations of Apache’s reply must be taken to be true on the motion for summary judgment. It alleges that at all of the times and dates specified in the defendant’s answer, and for many years thereafter down to May 28, 1941, the defendant wholly failed to qualify to do business in the State of Arizona, and that at all of said times and dates, and for a long time thereafter the said defendant was engaged in an enterprise of permanence and durability in the State of Arizona and did transact a substantial part of its ordinary business therein.

National Union Indemnity Co. v. Bruce Bros. Inc., supra.

We do not have to go farther than the decisions of the Supreme Court of Arizona on this subject. That Court in *National Union Indemnity Company v. Bruce Bros., Inc., supra.* uses the following language:

“But it is practically universally held that a party to an illegal contract cannot, either at the time of the execution of the contract or afterwards, waive his

right to set up the defense of illegality in any action thereon by the other party."

The Arizona Supreme Court in the case just cited quotes from *Hall v. Coppel*, 7 Wall, (74 U. S.) 542, 558, 19 L. Ed. 244, as follows:

"... In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the *law itself*. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A *stipulation* in most solemn form to *waive* the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the *law* will not lend its *support* to a claim founded upon its *violation*. *Morck v. Abel*, 3 Bosanquet & Puller, 35; *Armstrong v. Toler*, 11 Wheat. 258 (6 L. Ed. 468); *Collins v. Blantern*, 1 Smith's Leading Cases, 630, and notes.' "

In its opinion the Arizona Supreme Court then proceeds:

"See also, *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420; *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. Nor can a contract against *public policy* be made valid even by *ratification*. *United States v. Grossmayer*, 9 Wall.

72, 19 L. Ed. 627; *Ladd v. Rogers*, 11 Allen (Mass.) 209. The only exception to the general rule is that an account or contract which has been declared voidable only, for the protection or benefit of a certain party or class of parties, may be ratified unless such ratification is in contravention of public policy. *Norbeck, etc. Co. v. State*, 32 S. D. 189, 142 N. W. 847, Ann. Cas. 1916A 229. Were this contract one of the class which is voidable merely at the option of one of the parties, the defense of illegality could, of course, be waived. *Eastlick v. Hayward Lumber & Invest. Co.*, supra (33 Ariz. 242; 263 Pac. 936). But as we have pointed out, such is not the situation. Whatever the motive which induced the legislature to pass the section in question, it has made it applicable to all cases without exception. It has not merely, as in the case of the statutes of limitations, taken away the remedy but has denied the right. It has declared the contract void *ab initio*. This can be considered nothing but an expression of public policy upon the part of the state, and neither the *court* nor any *litigant* has the right to waive the provisions of the act. It is the *duty of the court* whenever the facts which render the contract void are *called to its attention*, to declare the law, and no party may recover in an action where the right of recovery must rest in some manner upon the void contract."

As the Supreme Court in *National Union Indemnity Company v. Bruce Bros., Inc.*, supra, points out, the statute has not merely, as in the case of statutes of limitations, taken away the remedy but has absolutely denied the right. The state has the unquestioned power to require a foreign corporation to qualify before it can lawfully do business in Arizona. The statute declares the said acts of the corporation defendant *void ab initio*. Thus

this requirement as to qualification of foreign corporations is a declaration not only of public policy, but an absolute requirement of our legislature. Until and unless a foreign corporation qualifies under the statute, any and all acts which it attempts to perform are absolutely and wholly void and no litigant has the right to waive the provisions of the act.

A companion case to the one just above cited is *Scott v. Bruce Bros., Inc.*, 44 Ariz. 469; 38 P. (2d) 654. These cases were consolidated and tried at the same time. Scott *had not pleaded* the lack of qualification of Bruce Bros. Inc., a foreign corporation, but had attempted, without success, to obtain leave to amend his pleadings on the trial. The Arizona Supreme Court said:

“Ordinarily, of course, a defendant may not on appeal urge a defense which was not set up in his pleading, but this is one of the *defenses which may be raised at any time.*”

The Arizona Supreme Court, to sustain this proposition, again makes the same quotation as appears above from *Hall v. Coppell* which is so brilliantly descriptive of the situation in this case that we will not attempt to comment upon it. In the Scott case the Arizona Supreme Court continues:

“It was the duty of the trial court upon such knowledge reaching it to hold immediately that no liability could be predicated as against any defendant upon the void contract. Such being the case, the trial court should have rendered judgment in favor of Scott on the ground that the contract upon which it was sought to hold him was void.”

Thereupon the Supreme Court of the State of Arizona reversed the Scott case with instructions to render judgment in favor of the defendant Scott. As the Apache did not answer the foreclosure case, knowledge of the Franklin's lack of qualification did not reach the court in that case.

As we have seen, it is wholly immaterial whether any party pleaded the lack of qualification of the foreign corporation; that when the facts appear in evidence in any court or in any proceeding such as the one at bar, which show that the foreign corporation had not qualified to do business, *it is the duty of the court*, sua sponte, to declare the law and decline to grant any relief to the party seeking the enforcement of such void contracts.

The judgment should be reversed, and the case remanded to the lower court with instructions to proceed with trial.

Respectfully submitted,

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